89-34

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JIMMY BARRIOS-MORIERA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether there exists, under the "plain view doctrine," probable cause to seize a rectangular package wrapped in opaque tape in an open shopping bag solely because the individual carrying the shopping bag had previously glanced at a car under police surveillance, and thereafter had continued walking to his apartment after the police officer following him had identified himself and asked him to stop.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

JIMMY BARRIOS-MORIERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, Jimmy Barrios-Moriera and Michael Donald Patrick, Esq., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in United States of America v. Jimmy Barrios-Moriera, 872 F.2d 12 (2d Cir. 1989).

OPINION BELOW

The opinion of the United States

Court of Appeals for the Second Circuit, dated March 30, 1989, appears in the Appendix hereto at pages A 3-16, and has been reported at 872 F.2d 12 (2d Cir. 1989).

The unreported decision of the United States District Court for the Eastern District of New York (Dearie, J.), dated March 24, 1988, denying petitioner's motion to suppress, appears in the Appendix hereto at pages A 17-18.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was issued on March 30, 1989. A petition for rehearing and a suggestion for rehearing in banc was denied May 9, 1989, and appears in the Appendix hereto as pages A 1-2. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment IV of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

Petitioner was arrested on the afternoon of July 22, 1987 when Drug Enforcement Administration ("DEA") Agent William Dolinsky looked into a shopping bag belonging to petitioner and observed a package wrapped in duct tape. Shortly

before making this observation, Agent Dolinsky observed petitioner drive past a black Audi automobile which Agent Dolinsky and New York City police officers had under surveillance. The black Audi automobile was believed by the agent to belong to the mother of a homicide suspect. As petitioner passed the car, he slowed and turned his heard in the direction of the Audi. Agent Dolinsky followed petitioner a few blocks to an apartment complex. During this brief time, he checked the license plate number on petitioner's car and learned that petitioner was the owner. Petitioner then parked his car, exited, removed a shopping bag from the trunk of the car, and walked across the parking lot toward an apartment complex. Agent Dolinsky got out of his car and decided to follow petitioner "to see where he was going with the bag." Dolinsky lost sight

of petitioner and began to jog after him for fear that he would be locked out of the apartment building. He eventually caught the door just before it closed, entered the building and immediately observed petitioner walking up the stairs to an apartment.

Agent Dolinsky then identified himself as a policeman and told petitioner he wanted to speak with him. Petitioner turned, looked at Dolinsky, and continued up the stairs. Upon reaching the door at the top of the stairs, petitioner set the shopping bag down on the floor, took out his keys and began to unlock the door to his apartment. Dolinsky then walked up the stairs, stood behind petitioner, and looked into the shopping bag. He saw a rectangular package wrapped in duct tape and concluded, based on his experience, that it must contain cocaine. Agent

Dolinsky then ordered petitioner into his apartment, arrested him, and conducted a further search of the apartment.

Petitioner was indicted on August 5, 1987 in the United States District Court of the Eastern District of New York. A hearing on petitioner's motion to suppress evidence commenced on January 22, 1988, before the Honorable Raymond L. Dearie, United States District Judge, Eastern District of New York. On March 24, 1988, at a continuation of the suppression hearing, Judge Dearie denied petitioner's motion to suppress in full. (Appendix, pages A 17-18). Petitioner was adjudicated guilty after trial on April 12, 1988, of possession with intent to distribute cocaine (21 U.S.C. §§ 841 (a)(1) and 841 (b)(1)(B)(ii)). He was sentenced on June 24, 1988, to 6 years imprisonment with a five-year term of supervised release.

REASONS FOR GRANTING THE PETITION

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON AN IMPORTANT FOURTH AMENDMENT ISSUE AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

This case presents an important question concerning the "plain view doctrine" of the Fourth Amendment and a person's right to be free from unreasonable search and seizure. The decision of the court below conflicts with this Court's decisions in Arizona v. Hicks, 480 U.S. 321 (1987), Texas v. Brown, 460 U.S. 730 (1983), and Coolidge v. New Hampshire, 403 U.S. 443 (1971), and should be reversed.

In Coolidge v. New Hampshire, 403 U.S. at 465-471, this Court recognized that in certain circumstances the police could seize without warrant items that came within their plain view during an

otherwise lawful search. It was distinctly noted, however, "that plain view alone is never enough to justify the warrantless seizure of evidence." Id. at 468 (emphasis in original). Moreover, in order for the "plain view doctrine" to apply, it must be "immediately apparent" to the police before seizing the item that it is contraband. Id. at 466.

Texas v. Brown, 460 U.S. at 741-742, although confirming the rule that a plain view seizure was presumptively reasonable -- assuming the existence of probable cause to associate the property with criminal activity -- left unresolved the issue of whether probable cause was required in order to invoke the plain view doctrine. That issue was subsequently addressed in Arizona v. Hicks, 480 U.S. at 326, where the Court held that probable cause was required. "To say otherwise would be to cut the

'plain view' doctrine loose from its theoretical and practical moorings." Id.

Thus, the question confronting the court below here was whether the suspecting DEA agent had probable cause to believe that the rectangular package he saw in petitioner's open shopping bag contained an illicit substance. This was a "close question," admitted the court, 872 F.2d at 16 (Appendix at page A-12), particularly in view of the fact that "the mere viewing and evaluation of the package alone" did not -- and could not -- constitute probable cause. 872 F.2d at 17 (Appendix at page A-14). Notwithstanding this limitation, however, the court found that "[t]he circumstances preceding the officer's ultimate face-to-face encounter with" petitioner, coupled with his viewing of the package, supported a "rising tide of suspicion" which produced sufficient probable cause

to believe that the package contained contraband. 872 F.2d at 18 (Appendix at page A-15).

As noted previously, this conclusion is inconsistent with prior rulings of this Court. The fact that a package is wrapped in duct tape should not reduce the reasonable expectation of privacy in its contents. As noted in Robbins v. California, 453 U.S. 420, 427 (1981), the mere circumstance that a container is distinctive does not necessarily mean that its appearance "proclaims its contents." What if DEA agents surmised from their experience that illicit drugs were "usually wrapped" in paper bags? Given the factual circumstances preceding the instant seizure, would the plain view doctrine thus permit the seizure of any paper bag? Plainly not.

Finally, objective examination of the circumstances preceding Agent

Dolinsky's peak into petitioner's shopping bag -- petitioner's evincing a glancing interest in a parked automobile that happened to be under surveillance; his removing a shopping bag from the trunk of his own car; his walking at a normal pace to his apartment complex; and, his continuing up the stairs to his apartment door when an unknown, non-uniformed person asks him to stop -- reveals that, far from supporting a "rising tide of suspicion" resulting in probable cause for the agent to believe that the package in the shopping bag contained contraband, 872 F.2d at 18 (Appendix at page A-15), petitioner's conduct and behavior could easily have been that of any innocent citizen in the neighborhood.

As Judge Pierce noted in his dissent below:

> Given the volume of crime and

> drug trafficking which occurs in metropolitan areas daily, by the court's holding today, citizens who reside in such areas will be rendered subject to stops and seizures as occurred herein, merely for pausing momentarily alongside the "wrong" automobile, failing to close the top of one's shopping bag, carrying therein a brick-size package wrapped in hardware-store duct tape, and happening to continue on one's way when a law enforcement officer calls to one to stop.

872 F.2d at 18 (Appendix at pages A15-A16) (Pierce, J., dissenting).

Review by this Court is warranted because the decision below is inconsistent with prior decisions of this Court and constitutes an impermissible expansion of the probable cause definition required for invocation of the

Fourth Amendment's "plain view doctrine."

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

MICHAEL DONALD PATRICK
Counsel for Petitioner

ARANDA & GUTTLEIN
Of Counsel

July 6, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the ninth day of May, one thousand nine hundred and eighty-nine.

UNITED STATES OF AMERICA,

Appellee,

-v-

JIMMY BARRIOS-MORIERA,

Appellant.

DOCKET NUMBER

88-1291

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellant JIMMY BARRIOS-MORIERA.

Upon consideration by the panel that

heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

\s\

ELAINE B. GOLDSMITH

Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 718—August Term 1988

(Argued January 31, 1989 Decided March 30, 1989)

Docket No. 88-1291

UNITED STATES OF AMERICA,

Appellee,

—v.—

JIMMY BARRIOS-MORIERA,

Appellant.

Before:

VAN GRAAFEILAND, CARDAMONE and PIERCE,
Circuit Judges.

Jimmy Barrios-Moriera appeals from a June 24, 1988 judgment of the United States District Court for the Eastern District of New York (Dearie, J.), convicting him of one count of possession of more than 500 grams of a narcotic with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B)(ii) (1982 & Supp. IV 1986).

Affirmed.

Judge Pierce dissents in a separate opinion.

MARGARET E. ALVERSON, New York, New York (Aranda & Guttlein, of counsel) *for Appellant.*

PETER SHERIDAN, Assistant United States Attorney, Eastern District of New York (Andrew J. Maloney, United States Attorney; John Gleeson, Assistant United States Attorney, of counsel) *for Appellee.*

CARDAMONE, *Circuit Judge*:

When a police officer seizes a wrapped article that later turns out to be contraband, the defendant invariably argues that only after seeing the item unwrapped did the officer have probable cause to believe it was of a criminal nature, though his testimony at the suppression hearing is to the contrary. We examine that close question on this appeal by Jimmy Barrios-Moriera from a June 24, 1988 judgment of conviction in the United States District Court for the Eastern District of New York (Dearie, J.), convicting him of possession of more than 500 grams of cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii) (1982 & Supp. IV 1986).

FACTS

On the afternoon of July 22, 1987 three officers—Special Drug Enforcement Administration (DEA) Agent

Dolinsky, Detective Healy and Sergeant Pena, the latter two of the New York City Police Department—were surveilling a parked black Audi automobile in the College Point area of Queens in connection with a recent drug-related homicide. At the suppression hearing, the DEA agent testified that he observed a blue Cadillac drive up 25th Road and make a left onto 123rd Street and drive past the black Audi parked on the right hand side of 123rd Street. Dolinsky then stated that the Cadillac "slowed down by the Audi, almost came to a stop and it appeared to me that the . . . [driver of the Cadillac] looked at the Audi for a few seconds."

Agent Dolinsky then radioed officers Healy and Pena, related to them what he had observed, and that he intended to follow the Cadillac, which he did for five blocks until it stopped and parked on 120th Street across the street from an apartment building. While trailing the Cadillac, Dolinsky checked its license plate number and learned that appellant was the owner. He too parked on 120th Street, and watched Barrios get out, go to the trunk, and take out a large shopping bag with white handles. The agent decided to follow to "see where he was going with the bag," and relayed this intention to Healy and Pena, who were now parked behind him.

Losing sight of Barrios as he entered the apartment complex, Dolinsky picked up his pace—almost jogging—because he knew that the door of the apartment building would automatically lock when it closed. Catching the door just in time, the agent observed Barrios halfway up a flight of stairs in a common hallway. Dolinsky identified himself as a policeman, and told Barrios that he wanted to speak with him. But appellant continued up the stairs until he reached the door to his apartment, where he took out

his keys and began to fumble with the lock, placing the shopping bag on the floor beside him.

When Dolinsky reached the top of the stairs, and was a step or two away from Barrios, he testified that he "glanced down to the bag" and "observed a rectangular object wrapped in tape." He thought that the wrapping was duct tape, and described the dimensions of the package—"approximately eight inches—eight inches in length by maybe four inches—four or five inches wide and four inches deep." On the basis of his four years as a DEA Special Agent and the hundreds of kilograms of cocaine he had seized while working with the New York City Drug Enforcement Task Force, Dolinsky concluded that the package was cocaine. He stated that "when they are packaged in a kilo form, they are usually wrapped in a masking tape, duct tape [or] contact paper type tape." Thus, he was "fairly confident it was a kilo of cocaine."

The agent thereupon picked up the bag, reached in and took the rectangular package in his hand, and told Barrios to go into his apartment. Dolinsky and Detective Healy—who now joined them—followed. Once inside, the officers encountered one Valderrama, whom Barrios described as a friend. Barrios consented to Healy's brief security check of the apartment. Dolinsky then informed Barrios of his rights and placed him under arrest. Later, appellant consented in writing to a full search, which unearthed two beepers.

On January 22, 1988 a suppression hearing was held before Judge Dearie in which appellant sought to demonstrate that the cocaine was unconstitutionally seized, or that it was tainted by Dolinsky's allegedly unlawful entry into Barrios' building. After hearing testimony from Dolinsky, Healy, Valderrama and Barrios, the district

court denied the motion. At trial, appellant was convicted of cocaine possession with intent to distribute. This appeal raises two issues, both related to the denial of the suppression motion, and only one of which requires extended discussion.

DISCUSSION

To support his claim that it was clearly erroneous for the district court to find the testimony of Special Agent Dolinsky and Detective Healy credible, Barrios cites cases in which officers Dolinsky and Healy have testified, and focuses on one case in which there was an adverse credibility determination concerning Agent Dolinsky. This claim is readily disposed of because after reading the transcript of the suppression hearing, we cannot say that Judge Dearie's finding of credibility leaves us "with a definite and firm conviction that a mistake has been committed." *United States v. Rios*, 856 F.2d 493, 495 (2d Cir. 1988).

Barrios' Fourth Amendment Claims

A. *Entry and Seizure*

Barrios' Fourth Amendment claims require a more detailed analysis. He asserts, first, that his motion to suppress the seized cocaine was improperly denied because Dolinsky's entry into his apartment building was unlawful. Barrios argues that the entry violated his reasonable expectation of privacy since Dolinsky penetrated an outer door that the agent knew would lock, and that he had a reasonable and legitimate expectation of privacy not merely in his apartment, but also in the common hallway of his multi-dwelling apartment complex.

The test to determine whether a person can claim Fourth Amendment protection in a given place depends upon whether the person has a legitimate subjective expectation of privacy in that area that society is prepared to accept as objectively reasonable. *See California v. Greenwood*, 108 S. Ct. 1625, 1628 (1988) (holding that there is no legitimate, subjective expectation of privacy in garbage put into plastic bags and placed out on the curb); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The intrusion here was not into appellant's home, where—absent a warrant issued upon probable cause or exigent circumstances—such an intrusion is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 589-90 (1980). Here the police entry was into a common hallway, an area where there is no legitimate expectation of privacy. Thus, a warrantless arrest is permissible even though the area was guarded by a locked door. *See United States v. Santana*, 427 U.S. 38, 42 (1976); *United States v. Holland*, 755 F.2d 253, 255-56 (2d Cir.) (collecting cases), *cert. denied*, 471 U.S. 1125 (1985); *United States v. Martinez-Gonzalez*, 686 F.2d 93, 101-02 (2d Cir. 1982). Hence, the expectation of privacy claim must fail.

Appellant next argues that he was unlawfully seized when he was "stopped" at the top of the stairs. Barrios contends that this encounter was a seizure within the Fourth Amendment because officers Dolinsky and Healy obviously intended to stop and question him. Concededly, the officers wanted to talk with Barrios about the drug-related homicide that they were investigating, particularly in light of the fact that their primary suspect drove the same black Audi in which Barrios had shown interest.

The Supreme Court has noted that law enforcement officers do not violate the Fourth Amendment merely by

approaching a person in a public place and asking questions. *See Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality); *id.* at 523 n.3 (Rehnquist, J. dissenting) (but concurring in this basic proposition). The test of whether interaction between police and a citizen constitutes a seizure is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). For a mere encounter to be considered a seizure, a substantial showing of force or authority is required. *See id.*; *see also I.N.S. v. Delgado*, 466 U.S. 210, 215-16 (1984) (holding that unless the encounter is so intimidating that a reasonable person would think he was not free to leave without answering the agent's questions, there is no detention under the Fourth Amendment).

Barrios urges that the totality of the circumstances—Dolinsky's pursuit, his calling out "police", and his request that appellant stop and speak with him—indicates an intent to detain Barrios on only a generalized suspicion. We disagree. No seizure occurred until after Dolinsky viewed the rectangular package; this, in turn, provided the evidentiary justification for detaining Barrios. Moreover, the encounter possessed none of the indicia of force or authority that typically earmarks a Fourth Amendment seizure, such as displaying a firearm, touching the individual, or a tone of voice or language indicating that compliance with an officer's request is required. *Compare Mendenhall*, 446 U.S. at 554 (holding that approach and request for identification of person by DEA agents in airport concourse not a seizure), *with Florida v. Royer*, 460 U.S. at 502-04 & n.9 (stating that retention of luggage, airline ticket and driver's license, and removal of individual to small room by police detectives is a seizure of person

under the Fourth Amendment). There was no such seizure in this case.

B. *Plain View Doctrine*

1. *In General*

Appellant's final Fourth Amendment claim is that Dolinsky's warrantless seizure of the rectangular package from the white shopping bag was unlawful because it was not justified under the "plain view doctrine." The general rule, of course, is that searches and seizures " 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. at 357). One such well-delineated exception is the plain view doctrine, under which a warrantless seizure of an item in plain view is permitted in limited circumstances. *See Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987); *Texas v. Brown*, 460 U.S. 730, 736-39 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443, 464-72 (1971). To seize an item on the theory that it is located in plain view, three conditions must be met. First, the initial intrusion by the police officer must be lawful so that he can justify being in a position to make his discovery. *Coolidge*, 403 U.S. at 466. Second, the discovery must be inadvertent. *Id.* at 466. Third, the police must have had probable cause to believe that the item seized was evidence of a crime. *See Arizona v. Hicks*, 480 U.S. at 326; *United States v. $10,000 in United States Currency*, 780 F.2d 213, 219-20 (2d Cir. 1986). Put another way, it must have been "immediately apparent" to the officer before seizing the item, not after seizing it, that it was of a criminal charac-

ter, *Coolidge*, 403 U.S. at 466. This limitation is essential because the proverb "the proof of the pudding is in the eating" has no application to Fourth Amendment law. *See United States v. Paulino*, 850 F.2d 93, 98 (2d Cir. 1988).

The plain view doctrine extends to nonpublic places the same authority the police have to make warrantless seizures in public places. *See Arizona v. Hicks*, 480 U.S. at 326-27; *Payton v. New York*, 445 U.S. at 584-90 (finding a warrantless intrusion into the home unreasonable absent exigent circumstances); *United States v. Watson*, 423 U.S. 411, 421-23 (1976) (permitting warrantless "midday, public arrest" of felony suspect so long as supported by probable cause). Thus, the three prerequisites of the doctrine—lawful entry, inadvertent discovery, and probable cause—are functional substitutes for the requirements of a warrant issued by a neutral magistrate based upon a showing of probable cause and particularly describing the items to be seized. *See United States v. $10,000 in United States Currency*, 780 F.2d at 216-18.

2. *Applied to Instant Case*

The lawfulness of the initial intrusion is the linchpin of the plain view doctrine. As the Supreme Court has observed, "[t]he question whether property in plain view of the police may be seized . . . must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question." *Texas v. Brown*, 460 U.S. at 737. As already noted, Agent Dolinsky was lawfully on the premises in a common hallway where Barrios had no reasonable expectation of privacy. Hence, the officer's presence outside Barrios' apartment was justifiable and satisfies the first element of the doctrine. *See Washington v. Chrisman*, 455 U.S. 1, 8-9 (1982) (discussing first element of plain view doctrine).

The second requirement—that the viewing of the item must be inadvertent—is to be read "neither to allow a premeditated seizure, nor to prevent effective police work." *United States v. $10,000 in United States Currency*, 780 F.2d at 218; *see also Coolidge*, 403 U.S. at 467-68. The specific evil against which the Fourth Amendment was directed was the "general warrant," which had permitted unrestrained rummaging through a person's belongings. The inadvertence requirement—like a warrant's particularity requirement—ensures that no impermissible exploration occurs. At the suppression hearing Agent Dolinsky testified that he had "glanced down to the [shopping] bag," that Barrios had placed on the floor. Because the bag was wide open he had an unimpeded view of its contents. This does not suggest any unlawful rummaging—indeed, Dolinsky's viewing was fortuitous—therefore Dolinsky's viewing was inadvertent.

We now turn to the final limitation which requires that the officer have probable cause to believe that the item seized was of a criminal nature and constituted evidence of a crime. *Arizona v. Hicks*, 480 U.S. at 326; *Texas v. Brown*, 460 U.S. at 741-42. Of the three plain view conditions this is the only one that presents a close question in this appeal. Probable cause is a flexible, common sense standard that "merely requires that the facts available to the officers would 'warrant a man of reasonable caution in the belief' that certain items may be contraband . . . or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. at 742.

The Supreme Court recently considered this element in *Texas v. Brown*. There a police officer, while making a routine traffic stop at a fixed checkpoint, asked Brown for

his license and, shining his flashlight into the car, saw Brown withdraw from his right-hand pocket an opaque balloon that was knotted about a half-inch from the tip. Brown dropped the balloon on the floor and reached into the glove compartment. Already alarmed by the balloon, the officer shifted position, looked into the glove compartment and noticed that it contained "several small plastic vials' quantities of loose white powder and an open bag of party balloons." 460 U.S. at 734. The officer reached in and seized the balloon; it was later found to contain heroin. *See id.*

In upholding this seizure under the plain view doctrine, the Supreme Court observed that the evidentiary significance of an item viewed must be assessed from the perspective of a law enforcement officer. *See id.* Near certainty of the article's criminal character is not necessary. The matrix of facts and circumstances, including the experience and judgment of the police officer, must be weighed in determining whether the item is contraband. *See id.* at 742-43. In *Texas v. Brown* "the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer." *Id.* at 743. The contents of the glove compartment revealed further suggestions that the balloon contained contraband and that criminal activity was afoot.

In the present case we think Agent Dolinsky had probable cause to believe that the rectangular package he saw in the open white bag contained contraband. He testified that for three and one-half years he had been working with the New York City Drug Enforcement Task Force and had participated in the seizure of three or four hundred separate kilos of cocaine. He observed that a kilogram of cocaine was typically wrapped in some variety of tape. In

fact, Agent Dolinsky not only had probable cause to believe that the package contained cocaine; his plain view of it also told him its approximate quantity. Clearly, the rectangular package, measuring a certain size, wrapped in duct tape, "spoke volumes as to its contents," particularly to an experienced DEA agent. *See Texas v. Brown*, 460 U.S. at 743. If what an officer subsequently finds *after* seizing an item could provide the justification for his initial action, then the "proof of the pudding" view would hold full sway. We refuse to allow a seizure of contraband to provide a *post hoc* justification for unlawful police conduct. Instead, the language of the Fourth Amendment erects a parchment barrier behind which the right to be secure from unreasonable searches and seizures safely resides. Good, effective and lawful police work, as in the case at hand, reinforces that parchment barrier which the proof of the pudding theory seeks to shred.

We do not mean to suggest that the mere viewing and evaluation of the package alone constituted probable cause. It is well-settled that police officers are allowed to consider, in addition, the evidentiary value of the items seized in the context in which they were seized to determine whether they are probative of criminal activity. *See United States v. Escobar*, 805 F.2d 68, 72 (2d Cir. 1986); *United States v. Panza*, 750 F.2d 1141, 1151-52 (2d Cir. 1984); *United States v. Callabrass*, 607 F.2d 559, 564 (2d Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Ochs*, 595 F.2d 1247, 1257 n.8 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979). This is consistent with judicial notions of probable cause for the issuance of a warrant. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 230-32 (1983) (in considering whether probable cause exists to support issuance of a warrant, the magistrate may consider the totality of the circumstances).

The circumstances preceding the officer's ultimate face-to-face encounter with Barrios and his viewing of the duct tape wrapped package support a rising tide of suspicion. Dolinsky and his fellow officers witnessed appellant evince an interest in the Audi automobile they were surveilling in connection with a *drug*-related homicide. The agent saw Barrios remove a large shopping bag from the trunk of his automobile, and when asked to stop by Dolinsky Barrios boldly continued up to his apartment. Thus, by the time he had arrived at the top of the stairs, glanced into the open bag, and saw the package, this experienced DEA officer had probable cause to believe that it contained contraband. Consequently, the third condition required to seize an object under the plain view doctrine was satisfied.

CONCLUSION

Accordingly, the district court correctly denied Barrios' motion to suppress the kilogram of cocaine because it was discovered by the police while in plain view. The judgment of conviction appealed from is therefore affirmed.

PIERCE, *Circuit Judge*, dissenting:

I dissent from the conclusion that the confluence of earlier events and the substantial experience of the federal agent warranted his "plain view" seizure of the duct-tape-wrapped rectangular package in appellant's open shopping bag.

Given the volume of crime and drug trafficking which occurs in metropolitan areas daily, by the court's holding today, citizens who reside in such areas will be rendered

subject to stops and seizures as occurred herein, merely for pausing momentarily alongside the "wrong" automobile, failing to close the top of one's shopping bag, carrying therein a brick-size package wrapped in hardware-store duct tape, and happening to continue on one's way when a law enforcement officer calls to one to stop.

Importantly, in the "balloon case," *Texas v. Brown*, 460 U.S. 730 (1983), the Supreme Court, in upholding a seizure, noted that the police officer looked in the glove compartment and saw "*several small plastic vials, quantities of loose white powder*, and an open bag of party balloons." *Id.* at 734 (emphasis added). Herein, the agent simply saw a package wrapped in duct tape, which he testified in his experience is commonly used to wrap kilogram packages of cocaine. I agree with the majority that the mere viewing and evaluation of the package alone did not constitute probable cause. However, unlike the majority, I do not believe that appellant's pausing before the Audi automobile and his failing to stop in response to the agent's call while walking upstairs to his apartment added enough to the probable cause calculus to justify the search and seizure.

I would reverse on the ground that the suppression motion should have been granted.

[Page 23 of Court Transcript of March 24, 1988 before District Judge Dearie]

Barrios-cross/Sheridan

Q. But you didn't sign that affidavit?

A. I don't remember. There were many. I have so many things in my head.

Q. Do you remember telling your lawyer in November, Mr. Barrios --

THE COURT: I don't know that we have to recount the question in quite that frame.

MR. SHERIDAN: Okay.

Q. Mr. Barrios, do you recall ever stating that after purchasing groceries several hours earlier on July 22nd, 1987, I was at home with Henry Valderamma and we were resting in the apartment?

A. As I told you before, from the moment that I arrived at my house until the moment that the police came to my house and knocked at the door, this is as far as I have gone.

MR. SHERIDAN: No further

questions, Your Honor.

THE COURT: Any questions?

MR. ARANDA: No.

THE COURT: You may step down. Any further witnesses.

MR. ARANDA: No, sir.

THE COURT: Mr. Sheridan, any further witnesses.

MR. SHERIDAN: No, sir.

THE COURT: Motion is denied. I'll render my findings and conclusions on the date of trial. Let's set a date, gentlemen. How long will this case take to try, Mr. Sheridan?

Supreme Court, U.S.
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No. 89-34

In the Supreme Court of the United States

OCTOBER TERM, 1989

JIMMY BARRIOS-MORIERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the narcotics agent had probable cause to believe that, on the facts of this case, a brick-shaped package wrapped in duct tape contained narcotics.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A16) is reported at 872 F.2d 12.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1989. A petition for rehearing was denied on May 9, 1989. Pet. App. A1-A2. The petition for a writ of certiorari was filed on July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was con-

victed of possessing more than 500 grams of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B) (1982 & Supp. V 1987). He was sentenced to six years' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed.

1. On the afternoon of July 22, 1987, three law enforcement officers—Drug Enforcement Administration Agent William Dolinsky and New York City Police Department Detectives Thomas Healy and Roy Pena—were conducting surveillance of a parked Audi automobile in the College Point area of Queens, New York, in connection with a recent drug-related homicide. The officers saw a blue Cadillac, driven by petitioner, proceeding down the street where the Audi was parked. The Cadillac " 'slowed down by the Audi, almost came to a stop and it appeared * * * that [petitioner] * * * looked at the Audi for several seconds.' " Pet. App. A4-A5.

Agent Dolinsky radioed Detectives Healy and Pena, he told the detectives what he had seen, and he said that he would follow the Cadillac. Agent Dolinsky then followed the Cadillac for approximately five blocks until it parked across the street from an apartment complex. Petitioner then got out of the car, took a large shopping bag from the trunk, and walked toward one of the apartment buildings. Agent Dolinsky followed petitioner on foot into the apartment building to "see where he was going with the bag." Pet. App. A5. When he entered the apartment building, Agent Dolinsky saw petitioner halfway up a flight of stairs in a common hallway. Dolinsky identified himself as a law enforcement officer and asked to speak with petitioner. Ignoring Dolinsky's request, petitioner continued up the stairs until he reached his apartment. While petitioner was fumbling with his keys, he placed the shopping bag on the floor beside him. *Id.* at A5-A6.

When Agent Dolinsky reached the top of the stairs and was a foot or two from petitioner, he glanced down into the shopping bag and saw a rectangular object approximately eight inches long, four or five inches wide, and four inches deep, that was wrapped in duct tape. Pet. App. A6. Based on his four years' experience as a DEA agent, during which time he had seized hundreds of kilograms of cocaine while working with the New York City Drug Enforcement Task Force, Agent Dolinsky concluded that the package contained cocaine. In his subsequent testimony, he explained that " 'when they are packaged in a kilo form, they are usually wrapped in a masking tape, duct tape[, or] contact paper tape.' " *Ibid.* The agent therefore was " 'fairly confident' " that the package held cocaine. *Ibid.* Agent Dolinsky reached into the bag and retrieved the cocaine. After a further investigation, Dolinsky placed petitioner under arrest. *Ibid.*

2. Before trial, petitioner moved to suppress the cocaine as the product of an unlawful search or seizure. The district court denied the motion, Pet. App. A18, and the court of appeals affirmed by a divided vote. *Id.* at A3-A15. At the outset, the court held that Agent Dolinsky's entry into the apartment building did not constitute a "search," *id.* at A7-A8, and that the agent's subsequent conduct in approaching petitioner in the hallway did not constitute a "seizure." *Id.* at A8-A10. Then, relying on *Texas* v. *Brown*, 460 U.S. 730 (1983), the court ruled that Agent Dolinsky's seizure of the package was supported by probable cause to believe that the package contained cocaine. As the court explained, "[t]he circumstances preceding the officer's ultimate face-to-face encounter with [petitioner] and his viewing of the duct tape wrapped package" provided a sufficient basis from which an experienced narcotics officer could conclude that the package contained narcotics. Pet. App. A13, A15.

Judge Pierce dissented. In his view, the facts known to Agent Dolinsky did not support the conclusion that the package was a kilogram of cocaine. Pet. App. A15-A16.

ARGUMENT

Petitioner renews his claim that the cocaine should have been suppressed as the product of a Fourth Amendment violation.

Petitioner's claim is quite narrow. He does not argue that Agent Dolinsky's entry into the apartment building or his retrieval of the package constituted an unlawful search, nor does he maintain that by approaching petitioner Agent Dolinsky effected an unlawful seizure. Instead, petitioner contends that Agent Dolinsky's seizure of the package was unlawful because the agent did not have probable cause to believe that the package contained cocaine. The courts below correctly rejected that claim, and it does not warrant review by this Court.

It is well settled that a law enforcement officer can seize property in plain view if there is probable cause to believe that the property is a fruit, an instrumentality, or evidence of a crime. *Arizona* v. *Hicks*, 480 U.S. 321, 326-328 (1987); *United States* v. *Jacobsen*, 466 U.S. 109, 121-122 & n.21 (1984) (collecting cases). See *United States* v. *Watson*, 423 U.S. 411 (1976) (the warrantless arrest of a person in a public place is lawful if it is supported by probable cause). Probable cause exists when, in light of the totality of the circumstances, there is a fair probability that a fruit, an instrumentality, or evidence of a crime will be found at a particular location. *Illinois* v. *Gates*, 462 U.S. 213, 238, 243-244 n.13 (1983).

In some cases probable cause to seize a package can be based on its distinctive configuration, because that configuration can suggest to an experienced law enforcement

officer that the package holds contraband. *Texas* v. *Brown*, 460 U.S. at 742-743 (plurality opinion). For instance, in *Texas* v. *Brown* this Court upheld the warrantless seizure of opaque balloons whose ends were tied, on the ground that the investigating officer reasonably believed that balloons were a commonly used means of packaging heroin and that the balloons in that case were being so used. As the plurality explained:

> [Officer] Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, [Officer] Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that [Officer] Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

Id. at 742-743. See also *id.* at 746 (Powell, J., concurring in the judgment) ("Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. * * * [A] law enforcement officer may rely on his training and experience to draw inferences and make deductions * * *.").[1]

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[1] Cf. *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979) ("Not all containers and packages found by police during the course of a search

The court of appeals reasonably applied those principles to the facts of this case. Narcotics agents frequently discover cocaine in packages like the one seized from petitioner.[2] In any event, contrary to petitioner's assertion, the court did not rule that any package wrapped in duct tape may automatically be seized, regardless of the surrounding circumstances, on the ground that it can be deemed to contain cocaine.[3] The court instead relied on the totality of the

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will deserve the full protection of the Fourth Amendment" because "their contents can be inferred from their outward appearance."); *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (plurality opinion) (stating that footnote 13 in *Sanders* describes "little more than another variation of the 'plain view' exception, since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from the searching officer's view").

[2] See, *e.g.*, *United States* v. *Klein*, 860 F.2d 1489, 1492 (9th Cir. 1988) ("A package, wrapped in grey duct tape, was discovered in [defendant's] vehicle. Unwrapped, the package revealed two one-kilogram 'bricks' of cocaine."); *United States* v. *Tormes-Ortiz*, 710 F. Supp. 409, 410 (D.P.R. 1989) (search of defendant's residence uncovered, inter alia, "[t]wo solid, white 'blocks' wrapped with yellow tape"; packages held cocaine); *United States* v. *Amparo*, No. 87 CR. 753 (MJL) (S.D.N.Y. Mar. 3, 1988), slip op. 1 (Westlaw, 1988 WL 25186) (at time of defendant's arrest, "[n]ext to [defendant] was an open plastic bag containing two brick-shaped packages wrapped in tape of the kind usually used to wrap cocaine"); *United States* v. *Puliese*, 671 F. Supp. 1353, 1357 (S.D. Fla. 1987) (search of home revealed "three packages of cocaine, wrapped in tape, and brick-shaped"); *United States* v. *Liberto*, 660 F. Supp. 889, 891 (D.D.C. 1987) ("The officer unfolded one bag, reached inside and removed a package in the shape and the consistency of a brick wrapped in gummed tape. Removal of the tape revealed a white powder, later identified by test as cocaine."), aff'd without opinion, 838 F.2d 571 (D.C. Cir. 1988) (Table).

[3] Accordingly, there is no basis to petitioner's prediction (Pet. 10) that the court of appeals' decision will allow police officers to seize any and all containers in which officers have found narcotics, such as an ordinary paper bag. Not only did the court of appeals rely on facts in addition to the packaging at issue here, but also that packaging itself,

circumstances in ruling that there was probable cause to seize the cocaine. The circumstances included the size and shape of the package, its distinctive wrapping, petitioner's interest in a vehicle under observation in a narcotics-related investigation, petitioner's attempt to avoid speaking with an identified law enforcement officer, and petitioner's apparent nervousness when the agent approached him, all seen through the eyes of an experienced narcotics agent.[4] The court of appeal's probable cause ruling is consistent with this Court's decision in *Texas* v. *Brown*, *supra*, and does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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which conformed in size and shape to a brick of cocaine, is far more likely to suggest the nature of its contents than is an ordinary paper bag.

[4] Contrary to petitioner's assertion (Pet. 11), facts that are innocent when considered separately may be indicative of criminal activity when they are considered as a whole. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens demands. * * * In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of non-criminal acts." *Illinois* v. *Gates*, 462 U.S. at 243-244 n.13.